

No. 41885-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DENNIS MCDANIEL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Susan J. Serko

APPELLANT'S REPLY BRIEF

Susan F. Wilk
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY	1
1. TESTIMONY OF THE FORENSIC CHILD INTERVIEWER THAT VOUCHERED FOR THE COMPLAINANT'S CREDIBILITY IMPROPERLY INVADED THE PROVINCE OF THE JURY AND DENIED MCDANIEL A FAIR TRIAL	3
a. Unlike in <i>Kirkman</i> , McDaniel objected to the improper opinions, thus the standard in that case, which identified when opinion testimony will be manifest constitutional error, is not applicable here	3
b. Thomas was a witness whose testimony carried an "aura of reliability" and her trial testimony and statements during the forensic interview more directly commented on credibility than the statements complained of in <i>Kirkman</i>	5
2. THE STATE'S ARGUMENT REGARDING MCCUTCHEON'S NEGLIGENT PARENTING IS A STRAW MAN; THE EVIDENCE WAS RELEVANT TO REBUT THE INFERENCE – URGED BY THE STATE – THAT C.D.'S BEDWETTING WAS CAUSED BY SEXUAL ABUSE	9
3. THE PROSECUTOR COMMITTED MISCONDUCT BY TAKING ADVANTAGE OF THE TRIAL COURT'S RULING EXCLUDING EVIDENCE THAT WOULD HAVE PROVIDED AN ALTERNATIVE EXPLANATION OF C.D.'S BEDWETTING BEHAVIOR.....	11
4. NO RECORD EXISTS OF HEARINGS IN WHICH CONTINUANCES WERE GRANTED	13
B. CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<u>State v. Darden</u> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	10
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.2d 125 (2007)	3, 5, 8
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008)	5
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995)	4
<u>v. King</u> , 167 Wn.2d 324, 219 P.3d 642 (2009)	4, 5, 7

Rules

RAP 2.5(a)	3
------------------	---

A. ARGUMENT IN REPLY

Dennis McDaniel was prosecuted for child molestation based upon a disclosure of alleged abuse by a three-and-a-half year old child, C.D. There was no physical corroboration of the alleged incident. During the three years that elapsed between the initial disclosure and McDaniel's trial, C.D. gave four disparate accounts of what supposedly had happened to her.

She told her mother, Rachel McCutcheon, that McDaniel had put hand sanitizer on her "private" while they were in the bathroom at the home of Teresa Russell, McDaniel's fiancée. RP 350, 475. She told an attending physician at the Harborview Sexual Assault Center that McDaniel had touched her once, over her underwear, with his fingertips. RP 637. She said that McDaniel also punched her in the mouth, and that Russell's father came over and watched this happen. Id. She told a child therapist that McDaniel had touched her "privates" three times, and that McDaniel's teenaged daughter and Russell's daughter were present. RP 533-34. She said this incident occurred at a friend's house. Id. To Cornelia Thomas, a forensic child interviewer, C.D. disclosed two separate incidents. RP 586. At trial, C.D. acknowledged that she did not remember the event. RP 339, 341.

To bolster its weak case, the State introduced the videotape of the forensic interview and elicited testimony from Thomas that suggested C.D.'s account was truthful. The State also emphasized evidence that C.D. had engaged in bedwetting behavior, an indicator of anxiety, urging the implication that the bedwetting was linked to the alleged abuse. At the same time, the State prevailed on the court to exclude evidence of McCutcheon's negligent parenting, which would have supplied an alternative explanation for the bedwetting.

On appeal, the State claims that Thomas did not vouch for C.D., that the exclusion of the evidence of McCutcheon's negligent parenting was not improper, and that the prosecutor's misuse of the bedwetting evidence was not misconduct. The State also defends the trial court's many continuances, granted over McDaniel's objection, on a variety of grounds. None of the State's arguments are persuasive. McDaniel did not receive a fair trial,

1. TESTIMONY OF THE FORENSIC CHILD INTERVIEWER THAT VOUCHED FOR THE COMPLAINANT'S CREDIBILITY IMPROPERLY INVADED THE PROVINCE OF THE JURY AND DENIED MCDANIEL A FAIR TRIAL.

a. Unlike in *Kirkman*, McDaniel objected to the improper opinions, thus the standard in that case, which identified when opinion testimony will be manifest constitutional error, is not applicable here. In discussing the State's use of Cornelia Thomas' testimony and comments during C.D.'s forensic child interview, the State elides over several key distinctions between this case and *State v. Kirkman*, 159 Wn.2d 918, 155 P.2d 125 (2007), the decision on which the State relies.

The first and most significant of these is that unlike the consolidated defendants in *Kirkman*, McDaniel specifically objected to the use of Thomas's testimony and forensic interview to vouch for C.D.'s veracity. Cf. RP 70-71, 246 with *Kirkman*, 159 Wn.2d at 923 (Kirkman's arguments made for the first time on appeal) id. at 925 (Candia's arguments made for the first time on appeal). Thus, unlike in *Kirkman*, this Court does not need to apply the rigorous standard under RAP 2.5(a) for manifest constitutional errors.

In *Kirkman*, because no party had objected to the statements at trial and there appeared to be a tactical reason for counsel's

omission, the Court enunciated a rule to be applied where no objection is made to opinion testimony: “[m]anifest error’ requires a nearly explicit statement by the witness that the witness believed the accusing victim.” Id. at 936; see also id. at 938 (“Manifest error requires an explicit or almost explicit witness statement on an ultimate issue of fact”). The Court reaffirmed the narrow scope of this holding in a subsequent opinion. See State v. King, 167 Wn.2d 324, 332, 219 P.3d 642 (2009).

In this case, McDaniel specifically moved in limine to prohibit the opinions and his motion was denied. Where the court makes a final ruling on a motion in limine, the losing party is deemed to have a standing objection at trial. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). Thus, the standard for determining whether the testimony and evidence were improper opinions depends upon the circumstances of the trial, including “(1) ‘the type of witness involved,’ (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense,’ and (5) ‘the other evidence before the trier of fact.’” King, 167 Wn.2d at 332-33 (citation omitted). Applying this standard, it is plain that Thomas’s testimony and statements during the forensic child interview improperly bolstered C.D.’s credibility.

b. Thomas was a witness whose testimony carried an “aura of reliability” and her trial testimony and statements during the forensic interview more directly commented on credibility than the statements complained of in *Kirkman*. Courts recognize that certain witnesses’ testimony “often carries a special aura of reliability.” King, 167 Wn.2d at 331; accord State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). For this reason, trial courts must exercise caution in admitting opinion testimony from such witnesses, as it is particularly likely to unduly influence the jury. King, 167 Wn.2d at 331.

Cornelia Thomas, an experienced “forensic child interviewer” employed by the Child Advocacy Center, was this type of witness. In claiming that Thomas’s testimony did not bolster the credibility of C.D.’s allegations, the State takes a myopic view that focuses solely on her trial testimony, without taking into account the questions asked by the prosecutor or her statements during the forensic child interview. Br. Resp. at 16-21. Moreover, her statements regarding C.D. went beyond the statements addressed in Kirkman.

At trial, when she discussed her general pre-interview colloquy regarding “truth” and “lie” with a child, Thomas stressed,

“[i]t’s really important that the child understand the difference between truth and lie and what’s right and wrong.” RP 570. She explained that this process helped her to ascertain when children were not being truthful. RP 570-71. The prosecutor then asked why it was “important to do a child forensic interview as opposed to having that child just come to court and testify?” RP 573.

Thomas replied,

Well it’s really important, first of all, to find out what the child has to say . . . It’s kind of their witness statement, if you will, to find out whether or not there is a crime that happened. Maybe something else totally different happened and there isn’t even a crime. And so it’s [important] to have someone that’s been trained in doing a forensic interview to go in and find out that information from a child.

RP 573 (emphasis added).

After laying this foundation, the prosecutor had the following exchange with Thomas:

Question (by prosecutor): Are there situations that you had where you interviewed a child and no disclosures are made?

Answer (by Thomas): Oh, yes.

Q: Okay. Have you interviewed children where no investigation – where the investigation kind of is concluded with no criminal case filed?

A: Absolutely, yes.

RP 576.

This exchange had the effect of impliedly endorsing the veracity of C.D.'s allegations: the plain implication was that C.D. had made a truthful disclosure that led to the filing of criminal charges. Thomas also helped the State address one of the weaknesses in its case, namely, the lengthy delay between the alleged event and C.D.'s second report of it, testifying that it is "more common" for children to delay in disclosing abuse than to disclose immediately. RP 580.

These inferences were fortified by Thomas's statements in the forensic interview. In the interview, Thomas engaged in a truth-lie colloquy with C.D., stressing that it was "really important" to tell the truth, and exhorting from her a "promise to tell [her] the truth." RP (Forensic Interview) 6. At the conclusion of the forensic interview, Thomas asked C.D., "Was everything that you told me today the truth?" RP (Forensic Interview) 23. C.D. responded in the affirmative. Id.

Applying the test set forth in King, this Court should conclude that the statements amounted to an impermissible expression that C.D.'s allegations were truthful. First, as noted, Thomas, a professional child interviewer, was the kind of witness whose

opinions carry a “special aura of reliability.” Cf. King, 167 Wn.2d at 331-33. Second, the testimony and evidence specifically urged the inference that C.D. told the truth during her forensic interview. Third, the charges were extremely serious, but the underlying allegations were conflicting and lacked physical corroboration. Fourth, McDaniel had raised a general denial defense. Finally, as the State concedes, at the time of trial, C.D. herself did not remember the incident, so Thomas’s statements at trial and during the interview played a key role in vouching for the credibility of the hearsay. Br. Resp. at 7.

As noted, in McDaniel’s opening brief, the prosecutor made the forensic interview a central focus of the State’s case, playing the video of the interview twice, during trial and during closing arguments. RP 582, 803. The prosecutor also pointed out in her closing argument that in the forensic interview, C.D. said her statements were true. RP 797.

In sum, since McDaniel objected to the admission of the opinions, the rigorous standard articulated in Kirkman – that the opinion be explicit – does not apply. Despite the many reasons to disbelieve C.D.’s allegations, Thomas’s statements strongly urged the jury to conclude that C.D.’s hearsay accusations during the

forensic interview were truthful. Given the otherwise weak evidence of guilt, this Court should reverse McDaniel's conviction.

2. THE STATE'S ARGUMENT REGARDING MCCUTCHEON'S NEGLIGENT PARENTING IS A STRAW MAN; THE EVIDENCE WAS RELEVANT TO REBUT THE INFERENCE – URGED BY THE STATE – THAT C.D.'S BEDWETTING WAS CAUSED BY SEXUAL ABUSE.

The State prevailed upon the trial court to exclude evidence that C.D.'s mother, Rachel McCutcheon, was a negligent parent. Having won this battle, the State then urged the jury to conclude that bedwetting and other indicators of anxiety exhibited by C.D. were caused by the alleged sexual abuse. RP 530, 541-42, 797.

In its response brief, the State creates a straw man argument. The State claims that since she was not a witness to the alleged molestation, the evidence of McCutcheon's drug use, her erratic lifestyle, and the CPS finding of negligent parenting were not relevant because they could not have affected her perception or recollection of the alleged event. Br. Resp. at 7-8.¹ The State ignores the evidence's relevance to its impact upon the environment in which C.D. lived and the context in which the

¹ The State apparently concedes that the trial court's reliance on "rape shield" as a basis to keep out the evidence was improper, but erroneously claims that this rationale was not the true basis for the court's ruling. Compare Br. Resp. at 29 with RP 288-89, 291, 296.

allegations were made. The State overlooks this significance even though the trial prosecutor – who presumably understood that parental neglect can cause regressive behaviors in children – contended that C.D.’s bedwetting was caused by sexual abuse.

As noted in McDaniel’s opening brief, relevancy is a low bar. “Even minimally relevant evidence is admissible.” State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). Br. App. at 23. The evidence of McCutcheon’s neglectful parenting directly bore upon the veracity of the allegations by providing an alternative explanation for the bedwetting behavior and other indicators of anxiety that the State suggested had been caused by sexual abuse. This Court should not be distracted by the State’s effort to recharacterize the evidence and its significance. As argued in McDaniel’s opening brief, this Court should conclude the exclusion of the evidence denied McDaniel his Sixth Amendment right to a defense.

3. THE PROSECUTOR COMMITTED MISCONDUCT
BY TAKING ADVANTAGE OF THE TRIAL
COURT'S RULING EXCLUDING EVIDENCE
THAT WOULD HAVE PROVIDED AN
ALTERNATIVE EXPLANATION OF C.D.'S
BEDWETTING BEHAVIOR.

Having succeeded in preventing the jury from hearing about McCutcheon's negligent parenting, the prosecutor urged the jury to conclude that C.D.'s bedwetting and inability to control her bladder corroborated the allegations against McDaniel. In its discussion of the prosecutor's misuse of this evidence, the State obfuscates the issue by focusing solely on the prosecutor's closing argument. See Br. Resp. at 35-36. But the closing argument was the culmination of a theme that the State had labored to construct throughout the trial. See RP 358-60 (prosecutor elicits testimony from McCutcheon regarding C.D.'s bedwetting and anxiety); RP 418, 427, 432 (prosecutor elicits testimony from Shaheerah Davis and Maria Del Carmen regarding C.D.'s regression to bedwetting behaviors); RP 530-32, 541-42 (prosecutor solicits opinion testimony from child therapist regarding possible link between bedwetting and abuse). In particular, the prosecutor urged the therapist to offer an "opinion as to whether bedwetting, losing eye

contact, frozen affect, can potentially be a sign that sexual abuse or physical abuse has occurred with children[.]” RP 541.

When the therapist cautiously responded that such behaviors can but “not always” will stem from abuse, the prosecutor again asked, “combine those things I’ve just listed; nervousness, no eye contact, frozen affect, combined with bedwetting after being potty trained, does that raise more concerns to you about whether or not the child has had some kind of trauma that triggered that?” Id. In response to this pointed question, the therapist replied, “Yes, combined with her disclosure.” RP 542.²

Knowing full well that there had been a founded allegation of parental neglect which was a possible if not likely cause of the behavior, the prosecutor then argued to the jury that the bedwetting corroborated the allegations of abuse. The State’s claim on appeal, therefore, that the closing argument “was simply a summary of the testimony”³ is disingenuous. This Court should conclude that the State’s effort to use the bedwetting and related evidence to bolster

² McDaniel’s counsel tried to minimize the impact of this testimony by confirming that other causes can lead to these behaviors. RP 542. Without evidence of another cause, however, counsel’s efforts could only have had a negligible effect upon the jury’s assessment of this testimony.

³ Br. Resp. at 35.

the otherwise weak allegations of abuse was misconduct, and was prejudicial.

4. NO RECORD EXISTS OF HEARINGS IN WHICH
CONTINUANCES WERE GRANTED.

In his opening brief, McDaniel catalogued the multiple continuances of his trial date over his objection. The State contends in response, *inter alia*, that no hearings were held on February 24 or September 9, 2010, and that McDaniel has failed to obtain transcription of other hearings.

With respect to the State's first contention, the docket indicates that continuances were granted on February 24, 2010, and September 9, 2010. See Ex. A (trial court docket). No transcript exists of the hearings on those dates.

The State alleges that those hearings were continued at prior court hearings, occurring on January 15, 2010 and September 3, 2010, and faults McDaniel for not obtaining a transcription of the January 15, 2010 and September 3, 2010 hearings. Despite advancing this argument, the State has not obtained these transcripts itself; instead it urges this Court to reject McDaniel's argument on the purely procedural argument that the State does

not have an affirmative obligation to arrange for transcription of hearings necessary for appellate review.

While it is unfortunate that the State seeks to avoid a decision on the merits by taking refuge in a species of procedural default argument, the State's representations regarding the record are incorrect. Since the State filed its brief, McDaniel has attempted to arrange transcription of the "hearings" on January 15 and September 3, 2010. McDaniel was informed by the Pierce County Superior Court clerk that no hearings occurred on those dates. See Ex. B (email from Superior Court Clerk).

Because no hearings occurred on the contested dates, and the State has not established that the trial court made an adequate record of the reasons for the many continuances granted over McDaniel's objection, this Court should conclude that McDaniel's right to a speedy trial was violated. The remedy is dismissal with prejudice.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in the Brief of Appellant, McDaniel's conviction should be reversed and dismissed.

DATED this 26th day of June, 2012.

Respectfully submitted:

Maurice M. Lynn (28724) for
SUSAN F. WILK (WSBA 28250)
Washington Appellate Project (91052)
Attorneys for Appellant

EXHIBIT A

Pierce County Superior Court Criminal Case 09-1-05629-5

**PURCHASE COPIES**

Defendant: **DENNIS MCDANIEL**
 Access: Public
 Jurisdiction: SUPERIOR CT - PIERCE CTY
 Initial Arrest Date: 12/30/2009
 Initial Bail Amount: \$500,000.00

Attorneys

Type	Name	Firm	Role
Pros	MICHELLE L. HYER	Prosecuting Attorney	LEAD COUNSEL

Charges

Count	Type	Description	RCW	Disposition	Sentence Date
1	Original	RAPE OF A CHILD IN THE FIRST DEGREE	<u>9A.44.073</u> , <u>9A.44.073</u>		
	Amended	RAPE OF A CHILD IN THE FIRST DEGREE	<u>9A.44.073</u> , <u>9A.44.073</u>		
	Final	RAPE OF A CHILD IN THE FIRST DEGREE	<u>9A.44.073</u> , <u>9A.44.073</u>	NOT GLTY/JURY	
<hr/>					
2	Original	CHILD MOLESTATION IN THE FIRST DEGREE	<u>9A.44.083</u>		
	Amended	CHILD MOLESTATION IN THE FIRST DEGREE	<u>9A.44.083</u>		
	Final	CHILD MOLESTATION IN THE FIRST DEGREE	<u>9A.44.083</u>	GLTY AS CHGD/JURY 03/11/2011	

Filings [e-file document] [download filings]

Filing Date	Filing	Access	Pages	Microfilm
12/16/2009	<u>INFORMATION</u>	Public	1	
12/16/2009	<u>AFFIDAVIT/DETERMINATION FOR PROBABLE CAUSE</u>	Public	2	
12/17/2009	<u>ORDER FOR ISSUANCE OF SUMMONS</u>	Public	1	
12/17/2009	<u>SUMMONS</u>	Public	1	
12/17/2009	<u>CERTIFICATE OF ADDRESS SEARCH</u>	Public	1	
12/18/2009	<u>RESTITUTION INFORMATION</u>	Confidential	1	
12/18/2009	<u>SUMMONS</u>	Public	1	
12/30/2009	<u>ORDER FOR HEARING</u>	Public	1	
12/30/2009	<u>ORDER ESTABLISHING CONDITIONS OF RELEASE</u>	Public	2	
12/30/2009	<u>ORDER OF PREASSIGNMENT</u>	Public	1	
12/30/2009	<u>CLERK'S MINUTE ENTRY</u>	Public	2	
12/30/2009	<u>ORDER PROHIBITING CONTACT PENDING DISP</u>	Public	2	
12/31/2009	<u>NOTICE OF APPEARANCE</u>	Public	1	
01/07/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1	
01/15/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1	
01/27/2010	<u>RESTITUTION INFORMATION</u>	Confidential	1	
02/01/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1	
03/05/2010	<u>OMNIBUS ORDER</u>	Public	3	
04/06/2010	<u>NOTICE PURSUANT TO RCW</u>	Public	2	
04/16/2010	<u>STIPULATION AGREED ORDER RE: IMAGES/AUDIO EVIDENCE</u>	Public	3	

04/21/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
06/04/2010	<u>RETURN ON SUBPOENA, GRAHAM</u>	Public	1
06/07/2010	<u>RETURN ON SUBPOENA, AGUIRRE</u>	Public	1
06/08/2010	<u>RETURN ON SUBPOENA, HOLDEN</u>	Public	1
06/08/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
06/08/2010	<u>STATE'S LIST OF WITNESSES</u>	Public	2
06/09/2010	<u>RETURN ON SUBPOENA -THOMAS</u>	Public	1
06/10/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
06/10/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
06/11/2010	<u>RETURN ON SUBPOENA, HOLDEN</u>	Public	1
06/11/2010	<u>RETURN ON SUBPOENA, AGUIRRE</u>	Public	1
06/11/2010	<u>RETURN ON SUBPOENA -8</u>	Public	8
06/14/2010	<u>RETURN ON SUBPOENA, RICHWALD</u>	Public	1
06/14/2010	<u>WITNESS LIST</u>	Public	2
06/15/2010	<u>RETURN ON SUBPOENA 8</u>	Public	8
06/15/2010	<u>NOTICE RE EVIDENSE</u>	Public	1
06/15/2010	<u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	13
06/15/2010	<u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	22
06/15/2010	<u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	22
06/15/2010	<u>AMENDED INFORMATION</u>	Public	2
06/17/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
06/24/2010	<u>RETURN ON SUBPOENA -CMD</u>	Public	3
06/30/2010	<u>SUBPOENA DUCES TECUM</u>	Public	1
06/30/2010	<u>SUBPOENA DUCES TECUM</u>	Public	1
06/30/2010	<u>SUBPOENA DUCES TECUM</u>	Public	1
07/01/2010	<u>MOTION TO EXCLUDE PRIOR ACTS & SUPPORTING MEMORANDUM</u>	Public	49
07/01/2010	<u>MOTION IN LIMINE</u>	Public	2
07/01/2010	<u>DEFENDANT'S LIST OF WITNESSES</u>	Public	1
07/02/2010	<u>SUBPOENA -HAILEY CONDOS</u>	Public	2
07/02/2010	<u>SUBPOENA -RUSSELL</u>	Public	2
07/02/2010	<u>SUBPOENA RUSSELL</u>	Public	2
07/08/2010	<u>RETURN ON SUBPOENA DSHS</u>	Public	2
07/08/2010	<u>RETURN ON SUBPOENA DSHS</u>	Public	2
07/08/2010	<u>RETURN ON SUBPOENA DSHS</u>	Public	2
07/16/2010	<u>RETURN ON SUBPOENA, GRAHAM</u>	Public	1
07/19/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
07/19/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
07/23/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
08/12/2010	<u>RETURN ON SUBPOENA, GRAHAM</u>	Public	1
08/12/2010	<u>RETURN ON SUBPOENA, AGUIRRE</u>	Public	1
08/12/2010	<u>RETURN ON SUBPOENA, HOLDEN</u>	Public	1
08/12/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
08/16/2010	<u>RETURN ON SUBPOENA, RICHWALD</u>	Public	1
08/18/2010	<u>ORDER FOR HEARING</u>	Public	1
08/18/2010	<u>STATE'S LIST OF WITNESSES</u>	Public	2
08/18/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
08/23/2010	<u>RETURN ON SUBPOENA -7</u>	Public	7

08/27/2010	<u>RETURN ON SUBPOENA -MCCUTCHEON</u>	Public	1
09/03/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
09/03/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
09/03/2010	<u>PROTECTIVE ORDER (RE: CONFIDENTIAL DISCOVERY DOCUMENTS, NOT RELATED)</u>	Public	2
09/03/2010	SEALED ENVELOPE NOT SCANNED	Sealed	
09/07/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE MCCUTCHEON</u>	Public	3
09/13/2010	<u>RETURN ON SUBPOENA, HOLDEN</u>	Public	1
09/14/2010	<u>RETURN ON SUBPOENA, GRAHAM</u>	Public	1
09/15/2010	<u>RETURN ON SUBPOENA, AGUIRRE</u>	Public	1
09/15/2010	<u>STATE'S LIST OF WITNESSES</u>	Public	2
09/17/2010	<u>RETURN ON SUBPOENA -2</u>	Public	2
09/17/2010	<u>RETURN ON SUBPOENA -6</u>	Public	6
09/17/2010	<u>RETURN ON SUBPOENA -MCCUTCHEON</u>	Public	1
09/17/2010	<u>RETURN ON SUBPOENA -C.M.D.</u>	Public	1
10/15/2010	<u>ORDER ON STATUS CONFERENCE</u>	Public	2
10/26/2010	<u>STATE'S LIST OF WITNESSES</u>	Public	1
10/26/2010	<u>RETURN ON SUBPOENA -FRANKLIN</u>	Public	1
10/26/2010	<u>MEMORANDUM "STATES"</u>	Public	17
10/26/2010	<u>MEMORANDUM OF AUTHORITIES</u>	Public	17
11/01/2010	<u>RETURN ON SUBPOENA -RUSSEL</u>	Public	1
11/02/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
11/02/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
11/02/2010	<u>ORDER ESTABLISHING CONDITIONS OF RELEASE</u>	Public	2
11/03/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
11/03/2010	<u>RETURN ON SUBPOENA -FRANKLIN</u>	Public	1
11/05/2010	<u>WITNESS LIST</u>	Public	2
11/09/2010	<u>RETURN ON SUBPOENA -7</u>	Public	7
11/09/2010	<u>RETURN ON SUBPOENA, GRAHAM</u>	Public	1
11/10/2010	<u>RETURN ON SUBPOENA -THOMAS</u>	Public	1
11/12/2010	<u>ORDER AUTHORIZING SUBSTITUTION OF COUNSEL</u>	Public	2
11/12/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
11/12/2010	<u>PROTECTIVE ORDER (RE: CONFIDENTIAL DISCOVERY DOCUMENTS, NOT RELATED)</u>	Public	2
11/16/2010	<u>RECEIPT OF DISCOVERY</u>	Public	1
11/19/2010	<u>DEFENDANT'S LIST OF WITNESSES</u>	Public	1
11/19/2010	<u>SUBPOENA -RUSSELL</u>	Public	2
11/19/2010	<u>SUBPOENA -CONDOS</u>	Public	2
11/19/2010	<u>SUBPOENA -RUSSELL</u>	Public	2
11/22/2010	<u>RETURN ON SUBPOENA, AGUIRRE</u>	Public	1
12/01/2010	<u>RETURN ON SUBPOENA, HOLDEN</u>	Public	1
12/02/2010	<u>RETURN ON SUBPOENA -RUSSELL</u>	Public	1
12/02/2010	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
12/02/2010	<u>CLERK'S MINUTE ENTRY</u>	Public	2
12/02/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE MCCUTCHEON</u>	Public	3
12/02/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE CARTER</u>	Public	3
12/03/2010	<u>RETURN ON SUBPOENA, HOLDEN</u>	Public	1

12/06/2010	<u>RETURN ON SUBPOENA, GRAHAM</u>	Public	1
12/06/2010	<u>RETURN ON SUBPOENA, AGUIRRE</u>	Public	1
12/07/2010	<u>STATE'S LIST OF WITNESSES</u>	Public	2
12/09/2010	<u>RETURN ON SUBPOENA -6</u>	Public	6
12/20/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE</u>	Public	3
12/22/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE</u>	Public	3
12/22/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE</u>	Public	1
12/23/2010	<u>AFFIDAVIT/DECLARATION OF SERVICE BLAIR</u>	Public	2
12/23/2010	<u>RETURN ON SUBPOENA DAVIS</u>	Public	2
12/23/2010	<u>RETURN ON SUBPOENA MCDANIEL</u>	Public	2
01/04/2011	<u>AFFIDAVIT/DECLARATION OF SERVICE TURNER</u>	Public	3
01/06/2011	<u>ORDER FOR CONTINUANCE OF TRIAL DATE</u>	Public	1
01/06/2011	<u>BENCH BRIEF IN SUPPORT</u>	Public	5
01/11/2011	<u>REQUEST OF DISMISSAL</u>	Public	10
01/19/2011	<u>EXHIBITS RECEIVED IN VAULT</u>	Public	1
01/19/2011	<u>STIPULATION AND ORDER FOR RETURN OF EXHIBITS AND/OR UNOPENED DEPOSITI</u>	Public	1
01/19/2011	<u>ORDER ALLOWING JURY TO SEPARATE</u>	Public	1
01/19/2011	<u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	21
01/20/2011	<u>EXHIBITS RECEIVED IN VAULT</u>	Public	1
01/20/2011	<u>BLANK JURY QUESTIONNAIRE</u>	Public	6
01/25/2011	<u>ORDER SEALING JUROR QUESTIONNAIRES</u>	Public	1
01/25/2011	SEALED JURY QUESTIONNAIRES	Sealed	271
01/25/2011	<u>PEREMPTORY CHALLENGE SHEET</u>	Public	1
01/25/2011	<u>JURY PANEL SELECTION LIST</u>	Public	3
01/25/2011	<u>JURY PANEL</u>	Public	1
01/26/2011	<u>SUBPOENA</u>	Public	2
01/27/2011	<u>STIPULATION</u>	Public	1
01/31/2011	<u>SECOND AMENDED INFORMATION</u>	Public	2
01/31/2011	<u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	2
01/31/2011	<u>WITNESS RECORD</u>	Public	1
01/31/2011	<u>EXHIBITS RECEIVED IN VAULT</u>	Public	1
02/02/2011	<u>WITNESS RECORD</u>	Public	1
02/02/2011	<u>PLAINTIFF'S PROPOSED INSTRUCTIONS</u>	Public	5
02/02/2011	<u>CLERK'S MINUTE ENTRY</u>	Public	11
02/02/2011	<u>ORDER ESTABLISHING CONDITIONS OF RELEASE</u>	Public	2
02/02/2011	<u>PRESENTENCE INVESTIGATION ORDER</u>	Public	1
02/02/2011	<u>COURT'S INSTRUCTIONS TO JURY</u>	Public	18
02/02/2011	<u>VERDICT FORM A, NOT GUILTY CNT I</u>	Public	1
02/02/2011	<u>VERDICT FORM B, GUILTY CNT II</u>	Public	1
02/08/2011	<u>LETTER FROM DEFENDANT</u>	Public	2
02/08/2011	<u>LETTER FROM DEFENDANT</u>	Public	2
03/08/2011	<u>PRE SENTENCING INFORMATION REPORT</u>	Confidential	22
03/11/2011	<u>STIPULATION TO PRIOR RECORD</u>	Public	3
03/11/2011	<u>JUDGMENT & SENTENCE & WARRANT OF COMMITMENT DOC</u>	Public	21
03/11/2011	<u>NOTICE/ADVICE OF COLLATERAL ATTACK</u>	Public	2
03/11/2011	<u>ORDER FOR BIOLOGICAL SAMPLE</u>	Public	2

03/11/2011	<u>ORDER FOR HIV TEST</u>	Public	2
03/11/2011	<u>APPENDIX "H" TO JUDGMENT AND SENTENCE</u>	Public	3
03/11/2011	<u>NOTICE OF APPEAL</u>	Public	1
03/11/2011	<u>MOTION AND AFFIDAVIT OF INDIGENCY</u>	Public	5
03/11/2011	<u>ORDER OF INDIGENCY</u>	Public	3
03/11/2011	<u>ORDER PROHIBITING CONTACT SENTENCING</u>	Public	2
03/11/2011	<u>LETTER IN/FOR SUPPORT</u>	Public	10
03/11/2011	<u>COPIES OF PRIOR CRIMINAL RECORDS</u>	Public	118
03/11/2011	<u>CLERK'S MINUTE ENTRY</u>	Public	2
03/16/2011	<u>PERFECTION NOTICE FROM COURT OF APPEALS</u>	Public	2
04/18/2011	<u>DESIGNATION OF CLERK'S PAPERS</u>	Public	3
04/22/2011	<u>CLERK'S PAPERS PREPARED</u>	Public	3
04/22/2011	<u>INDIGENCY BILLING VOUCHER</u>	Public	1
04/22/2011	<u>CLERK'S PAPERS SENT</u>	Public	1
06/09/2011	VERBATIM REPORT TRANS TO DIV II *6/10/10*	Restricted	
06/10/2011	<u>TRANSMITTAL LETTER VRP COPY FILED</u>	Public	1
07/29/2011	<u>NOTICE OF FILING A VERBATIM REPORT</u>	Public	1
07/29/2011	VERBATIM REPORT TRANS TO DIV II *01-13-11*VOL 1	Restricted	
07/29/2011	VERBATIM REPORT TRANS TO DIV II *01-20-11*VOL 2	Restricted	
07/29/2011	VERBATIM REPORT TRANS TO DIV II *01-25-11*VOL 3	Restricted	
07/29/2011	VERBATIM REPORT TRANS TO DIV II *01-26-11*VOL 4	Restricted	
07/29/2011	VERBATIM REPORT TRANS TO DIV II *01-27-11*VOL 5	Restricted	
07/29/2011	VERBATIM REPORT TRANS TO DIV II *01-31-11*VOL 6	Restricted	
07/29/2011	VERBATIM REPORT TRANS TO DIV II *02-02-11*VOL 7	Restricted	
07/29/2011	<u>TRANSMITTAL LETTER VRP COPY FILED</u>	Public	1
10/06/2011	VERBATIM REPORT TRANS TO DIV II *1/6/11*	Restricted	
10/07/2011	<u>TRANSMITTAL LETTER VRP COPY FILED</u>	Public	1
10/14/2011	VERBATIM REPORT TRANS TO DIV II *2/24/10*	Restricted	
10/14/2011	<u>TRANSMITTAL LETTER VRP COPY FILED</u>	Public	1
03/08/2012	VERBATIM REPORT TRANS TO DIV II 8/13/09 SEALED	Sealed	24
03/09/2012	<u>TRANSMITTAL LETTER VRP COPY FILED</u>	Public	1
03/14/2012	<u>DESIGNATION OF CLERK'S PAPERS</u>	Public	2
04/09/2012	<u>NOTICE OF FILING A VERBATIM REPORT</u>	Public	1
04/10/2012	<u>VERBATIM REPORT TRANS TO DIV II 1/25/11</u>	Public	21
04/11/2012	<u>TRANSMITTAL LETTER VRP COPY FILED</u>	Public	1
04/16/2012	<u>CLERK'S PAPERS PREPARED</u>	Public	2
04/16/2012	<u>CLERK'S PAPERS SENT</u>	Public	1



PURCHASE COPIES

Proceedings

Date	Judge	Dept Type	Outcome
12/30/2009 01:30 PM	CRIMINAL DIVISION 2	CD2 CASE ISSUED-SUMM/ARRAIGN	ARRAIGNED
01/15/2010 11:00 AM	JAMES ORLANDO	01 OMNIBUS HEARING	CONTINUED
02/24/2010 08:30 AM	JAMES ORLANDO	01 JURY TRIAL	CONTINUED
03/05/2010 11:00 AM	JAMES ORLANDO	01 OMNIBUS HEARING	HELD
06/10/2010 09:00 AM	JAMES ORLANDO	01 JURY TRIAL	CONTINUED
07/19/2010 09:00 AM	JAMES ORLANDO	01 JURY TRIAL	CONTINUED
07/23/2010 11:00 AM	JAMES ORLANDO	01 BAIL HEARING	HELD
09/03/2010 11:00 AM	JAMES ORLANDO	01 STATUS CONFERENCE HEARING	CONTINUED

09/09/2010 09:00 AM	JAMES ORLANDO	01	JURY TRIAL	CONTINUED
10/15/2010 11:00 AM	JAMES ORLANDO	01	STATUS CONFERENCE HEARING	HELD
11/02/2010 09:00 AM	JAMES ORLANDO	01	JURY TRIAL	CONTINUED
11/12/2010 10:30 AM	JAMES ORLANDO	01	BAIL HEARING	HELD
11/12/2010 10:30 AM	JAMES ORLANDO	01	STATUS CONFERENCE HEARING	HELD
12/02/2010 09:00 AM	JAMES ORLANDO	01	JURY TRIAL	CONTINUED
01/06/2011 09:00 AM	SUSAN K. SERKO	14	JURY TRIAL	CONTINUED
01/13/2011 09:00 AM	SUSAN K. SERKO	14	JURY TRIAL	HELD
01/19/2011 08:30 AM	SUSAN K. SERKO	14	INTERRUPTED TRIAL/HRG RESUMES	TRIAL/HRG RESUMED
01/25/2011 11:30 AM	SUSAN K. SERKO	14	REARRAIGNMENT	HELD
01/31/2011 10:30 AM	SUSAN K. SERKO	14	REARRAIGNMENT	HELD
03/11/2011 01:30 PM	SUSAN K. SERKO	14	SENTENCING W/PSI	HELD

Incidents

Incident Number	Law Enforcement Agency	Offense Date
091730898	TACOMA POLICE DEPARTMENT	06/22/2007

Superior Court Co-Defendants

Cause Number	Defendant
--------------	-----------

Judgments

Cause #	Status	Signed	Effective	Filed
<u>11-9-02897-7</u>	OPEN as of 03/11/2011	SUSAN K. SERKO on 03/11/2011	03/11/2011	03/11/2011

- Hearing and location information displayed in this calendar is subject to change without notice. Any changes to this information after the creation date and time may not display in current version.
- Confidential cases and Juvenile Offender proceeding information is not displayed on this calendar. Confidential case types are: Adoption, Paternity, Involuntary Commitment, Dependency, and Truancy.
- The names provided in this calendar cannot be associated with any particular individuals without individual case research.
- Neither the court nor clerk makes any representation as to the accuracy and completeness of the data except for court purposes.

Created: Tuesday June 26, 2012 12:05PM

Copyright © 1996-2012 Pierce County Washington. All rights reserved.

EXHIBIT B

Ann Joyce

From: Shaun Linse [slinse@co.pierce.wa.us]
Sent: Tuesday, May 15, 2012 11:21 AM
To: Ann Joyce
Subject: State vs. Dennis McDaniel, No. 09-1-05629-5

Ms. Joyce, I looked up both January 15, 2010 and September 3, 2010. The Omnibus Hearing and the Status conference were both continued. There is no journal entry and nothing went on the record. I confirmed this with my Judicial Assistant Janet to make sure that was correct and she confirmed that for me.

Thank you,

Shaun Linse, Dept 01

6/26/2012

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**


STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 41885-1-II
v.)	
)	
DENNIS MCDANIEL,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KATHLEEN PROCTOR, DPA	()	U.S. MAIL
BRIAN WASANKARI, DPA	()	HAND DELIVERY
PIERCE COUNTY PROSECUTOR'S OFFICE	(X)	E-MAIL VIA COA E-FILE
930 TACOMA AVENUE S, ROOM 946		
TACOMA, WA 98402-2171		
E-MAIL: PCpatcecf@co.pierce.wa.us		
E-MAIL: bwasank@co.pierce.wa.us		

SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JUNE, 2012.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎ (206) 587-2711

WASHINGTON APPELLATE PROJECT

June 26, 2012 - 5:52 PM

Transmittal Letter

Document Uploaded: 418851-Reply Brief.pdf

Case Name: STATE V. DENNIS MCDANIEL

Court of Appeals Case Number: 41885-1

Is this a Personal Restraint Petition? ☐ Yes ☒ No

The document being Filed is:

- ☐ Designation of Clerk's Papers ☒ Supplemental Designation of Clerk's Papers
- ☐ Statement of Arrangements
- ☐ Motion: _____
- ☐ Answer/Reply to Motion: _____
- ☒ Brief: Reply
- ☐ Statement of Additional Authorities
- ☐ Cost Bill
- ☐ Objection to Cost Bill
- ☐ Affidavit
- ☐ Letter
- ☐ Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- ☐ Personal Restraint Petition (PRP)
- ☐ Response to Personal Restraint Petition
- ☐ Reply to Response to Personal Restraint Petition
- ☐ Other: _____

Comments:

This is being filed past the cut-off time due to a network system glitch which is causing my computer to intermittently lose its internet connection. Kindly accept for filing today. Thank you.

Sender Name: Maria A Riley - Email: maria@washapp.org

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us

bwasank@co.pierce.wa.us